No. 96-945

Supreme Court, U.S.
FILED
MAR 5 1997
CLERK

In The

# Supreme Court of the United States

October Term, 1996

R. DERRY CROSBY, D.O.,

*Petitioner,*

*vs.*

HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY d/b/a SOUTH GEORGIA MEDICAL CENTER, *et al.*,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## REPLY BRIEF FOR PETITIONER

O. WAYNE ELLERBEE
THE ELLERBEE LAW FIRM, P.C.
1000 Slater Street
P.O. Box 25
Valdosta, Georgia 31603-0025
(912) 242-2211

JAMES F. PONSOLDT
UNIVERSITY OF GEORGIA
SCHOOL OF LAW
Athens, Georgia 30602
(706) 542-5209

LEWIS H. MARKOWITZ
*Counsel of Record*
MARKOWITZ & MARKOWITZ, P.C.
Two West Market Street
P.O. Box 152
York, Pennsylvania 17405-0152
(717) 843-5527

*Attorneys for Petitioner*

70029 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

## TABLE OF CONTENTS


*Page*

I. There Is A Conflict Among The Circuits In The Determination Of When A State Has Clearly Articulated A Policy to Displace Competition Among Municipality-Owned Hospitals And Doctors. ..... 1

A. The Objective Test Of Foreseeability .... 3

Conclusion ..... 7


## TABLE OF CITATIONS

**Cases Cited:**


*California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980) ..... 5, 6

*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) ..... 2

*Cobb County-Kennestone Hospital Authority v. Prince*, 242 Ga. 139, 249 S.E. 2d 581 (1978) ..... 5

*Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 103 F.3d 1446, 72 ATRR 59 (9th Cir. 1996) ..... 5, 6

*Lancaster County Community Hosp. v. Antelope Valley Hosp. District*, 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) ..... 1, 2, 3, 5

*Contents*


| | Page |
|---|---|
| *Martin v. Hospital Authority of Clarke County*, 264 Ga. 626, 449 S.E. 2d 827 (1994) | 4 |
| *Mitchell County Hospital Authority v. Joiner*, 229 Ga. 140, 189 S.E. 2d 412 (1972) | 5 |
| *Ramey v. Hospital Authority of Habershaw County*, 218 Ga. App. 618, 462 S.E. 2d 787 (1994) | 4, 5 |
| *St. Mary's Hosp. of Athens, Inc. v. Cohen*, 216 Ga. App. 761, 456 S.E. 2d 79 (1995) | 5 |
| *Sweeney v. Athens Regional Medical Center*, 709 F. Supp. 1563 (M.D. Ga. 1989) | 5 |
| *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 440 S.E. 2d 195 (1994) | 4 |
| *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) | 1, 2, 4 |
| **Statutes Cited:** | |
| 15 U.S.C. § 35 | 4 |
| O.C.G.A. § 31-7-7 | 2, 3 |
| O.C.G.A. § 31-7-15 | 2 |

*Contents*

*Page*

**Other Authorities Cited:**

Georgia Constitution, Art. III, Section 6, ¶ 5(c) ..... 2

Harris, *State Action Immunity from Anti-Trust Law for Public Hospitals: The Hidden Time Bomb for Health Care Reform*, 44 Kansas L. Rev. 459 (1996) ..... 6

Jacobs, *When Anti-Trust Fails: Public Health, Public Hospitals and Public Values*, 71 Wash. L. Rev. 899 (1996) ..... 6

## I.

## THERE IS A CONFLICT AMONG THE CIRCUITS IN THE DETERMINATION OF WHEN A STATE HAS CLEARLY ARTICULATED A POLICY TO DISPLACE COMPETITION AMONG MUNICIPALITY-OWNED HOSPITALS AND DOCTORS.

Neither Respondent Hospital Authority nor Medical Staff have addressed the core issue of a conflict among the circuits regarding the "clear articulation" requirement for state action immunity when applied to market participant conduct by hospitals and doctors. The Hospital Authority ignores the argument. The Medical Staff inferentially concedes that there is a conflict with the Ninth Circuit. It seeks to minimize the conflict by claiming that *Lancaster County Community Hosp. v. Antelope Valley Hosp. District,* 940 F.2d 397 (9th Cir. 1991) did not involve peer review activities.

The conflict that exists encompasses not only peer review, but the broader question of how is a clearly articulated policy to displace competition determined, when a municipal hospital has been generally authorized to engage in necessary business activities, but not to do so in an effort to displace competition. In *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) this Court held that, in order to establish a clearly articulated state policy to displace competition, the anti-competitive conduct must be a foreseeable result of the state legislature's delegation of power to the municipality. *Id.* at 41-43. Thus, foreseeability is a surrogate for intent, which in turn, is a surrogate for the adoption of a clearly articulated policy to displace competition. While this Court established the test of foreseeability, it has not explained how foreseeability should be defined in this context or how it should be determined.

This void has created a conflict between various circuits.

For example, in the present case, the Eleventh Circuit held that necessary legislative authorization to make staff privileges decisions contemplate and/or articulate that such power would be implemented to achieve specific anti-competitive results.

In contrast, the Ninth Circuit has reasoned that *Town of Hallie* and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) preclude federal courts from inferring a state's anti-competitive policy from the mere authorization to act as a market participant. *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401 n.6 (9th Cir. 1991), *cert. denied,* 502 U.S. 1094 (1992). In *Lancaster* the court found no state policy, in creating public hospitals to displace competition with other market participants.

Georgia does not have a clear statement of legislative intent to encourage or allow anti-competitive conduct in the health care field. Indeed, the fundamental law of Georgia as expressed unequivocally in its Constitution in Art. III, Section 6, ¶ 5(c) is to prohibit anti-competitive conduct either by restraining trade or by engaging in monopolistic conduct.[1] Moreover, by statute, Georgia specifically has prohibited anti-competitive discrimination against osteopathic physicians in staffing and licensing positions.[2]

---

1. Therefore, under the Ninth Circuit view, the statutes relied upon by the Eleventh Circuit would be examined in light of the Georgia Constitution and would be found to support Petitioner's argument.

2. O.C.G.A. § 31-7-7 applies only to public hospitals, but not to private hospitals. That language requires the non-discriminatory treatment of staff membership applications. By contrast, the provisions of O.C.G.A. § 31-7-15 mandating peer review applies to both, public and private hospitals. The Eleventh Circuit attempts to discern "a clear articulation" from this.

(Cont'd)

## A. The Objective Test Of Foreseeability

This approach, which is utilized by the Ninth Circuit, uses the court's conclusion about the state's general policy in a particular industry as a means of determining foreseeability. This approach is objective in the sense that it is based on the court's view of the state's current policy, as indicated by the statutes, not on a retrospective analysis of what the state legislature, in fact, foresaw. After conducting an analysis of all of the statutes that apply to a particular industry, the court determines whether the state has a general policy to displace competition in that industry.

Thus, in *Lancaster Community Hospital v. Antelope Valley Hospital District,* 940 F.2d 397 (9th Cir. 1991), *cert. denied,* 502 U.S. 1094 (1992), the Court held that a public hospital was

---

(Cont'd)

Contrary to the court below and Respondent's arguments herein, O.C.G.A. § 31-7-7 does not mandate the denial of staff privileges to otherwise qualified applicants. Respondents concede by their reference dehors the record that the Orthopedic Service was not being over-utilized because (1) the record below clearly established that was not the reason for Petitioner's denial; and (2) additional orthopedic surgeons were added to the staff.

The requirement that Dr. Crosby be approved by the American Academy of Orthopedic Surgery was the imposition of a condition that no member of the Hospital Staff could meet. The record below was not disputed on this point. (94a - 95a). Respondents' arguments that there was ultimately a change in the stated reasons (which was disputed by Petitioner) does not eliminate the existence of a conspiracy to deny Petitioner staff privileges for anti-competitive reasons. The trial court did not permit discovery on this issue and, therefore, assumed that Petitioner could meet its burden of proof on this issue. (56a-57a). However, the trial court held that the state action immunity precluded Petitioner from ever actually proving this argument because it concluded that Georgia had foreseen that competition would be excluded. The Eleventh Circuit agreed. This completely eliminated any consideration of the Constitutional provisions.

not immune from federal antitrust laws.[3] The Hospital District argued that it was entitled to state action immunity because its statutory authorization was as broad as that of the municipal defendant in *Town of Hallie*. *Id.* at 400-401. The Ninth Circuit rejected this argument and held that a court must consider whether the general policy of the state is to support or displace competition. *Id.* at 401 ("*Town of Hallie* does not support defendants' mechanistic position.") The Court rejected the Eleventh Circuit's view that a hospital authority's general statutory authority to engage in conduct that private actors or hospitals also perform is authority to supplant competition. *Id.* at 400-402. Despite Respondents' attempts to minimize its significance, *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 440 S.E. 2d 195 (1994) unequivocally supports the proposition that an authority is placed on the same level as a private hospital and derives no special benefit or protection from that status.[4] The fact that a public hospital may have broad powers in selecting its staff does not mean that it has greater power or discretion in selection of staff than a private hospital.[5]

---

3. The Court did find that public hospitals are immune from monetary damages under the Local Government Antitrust Act, 15 U.S.C. § 35 (1994) and could be sued only for injunctive relief and attorneys' fees. 940 F.2d at 404 n.14.

4. Respondents argue that because in *Martin v. Hospital Authority of Clarke County*, 264 Ga. 626, 449 S.E. 2d 827 (1994), the court concluded that the Authority was a governmental entity, therefore, it could not be made to respond in punitive damages and it somehow is immunized from the reach of the antitrust laws. Valid policy reasons exist that neither the sovereign nor any public or quasi-public entity should be made to respond in punitive damages. However, neither this Court nor any lower federal court has ever concluded that because a local governmental entity is immunized from paying monetary damages in an antitrust case, they are given a *carte blanche* exemption from antitrust liability.

5. Respondents have cited *Ramey v. Hospital Authority of Habershaw*

(Cont'd)

The Ninth Circuit reviewed various California statutes in reaching its decision in *Lancaster Community Hosp.* It noted that public hospitals are not utilities, for which the court is more likely to find a state policy to displace competition, and that the public hospital did not have regulatory power over the hospital market. *Lancaster Community Hosp.*, 940 F.2d 401-402.

In a case decided since the Petition for a Writ of Certiorari was filed before this Court, the Ninth Circuit held that it is error to substitute a foreseeability test for the clear articulation requirement of *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). The court in *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 103 F.3d 1446, 1462, 72 ATRR 59, 61 (9th Cir. 1996) held that:

> We are persuaded by Columbia Steel's Petition for Rehearing and an amicus curiae brief filed by the *Anti-Trust Division of the Department of Justice* that we erred in

---

(Cont'd)

*County*, 218 Ga. App. 618, 462 S.E. 2d 787 (1994); *Cobb County-Kennestone Hospital Authority v. Prince*, 242 Ga. 139, 249 S.E. 2d 581 (1978); *Mitchell County Hospital Authority v. Joiner*, 229 Ga. 140, 189 S.E. 2d 412 (1972), as authority for the proposition that a public hospital can set standards and has broad discretion in granting staff privileges. None of those cases hold, however, that a public hospital in Georgia has greater leeway in staff privilege matters than a private hospital. Georgia law gives private hospitals the same powers in determining staff privilege applications as public hospitals. *St. Mary's Hosp. of Athens, Inc. v. Cohen*, 216 Ga. App. 761, 456 S.E. 2d 79 (1995). Neither do they hold that a public hospital nor its staff are authorized to engage in anti-competitive conduct in the granting or denial of staff privileges. In fact, *Sweeney v. Athens Regional Medical Center*, 709 F. Supp. 1563, 1576 (M.D. Ga. 1989) specifically holds that private actors engaged in staff decisions do not enjoy immunity for anti-competitive conduct.

> allowing a foreseeability test to be substituted for the clear articulation test of *Midcal.* (Emphasis Added).

The Court continued at *id.* 1462-63, ATRR at 62 that:

> The *Midcal* test is a "rigorous" one that "ensure[s] that private parties [can] claim when their anticompetitive acts [are] truly the product of state regulation." *Patrick v. Burget,* 486 U.S. 94, 100 (1988). It guarantees that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's immunity that is "disfavored, much as are repeals [of the antitrust laws] by implication," *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636 (1992), because of Congress's "overarching and fundamental policies" protecting competition, *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398-99 (1978).

The Court concluded that "state action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymaker." *Id.* F.3d at ATRR at 65. The Court concluded that it originally erred when it attempted to substitute a foreseeability test for the clear articulation test of *Midcal. Id.* This issue, obviously, has divided commentators as well as the court. *See* Harris, *State Action Immunity from Anti-Trust Law for Public Hospitals: The Hidden Time Bomb for Health Care Reform,* 44 Kansas L. Rev. 459-516 (1996); Jacobs, *When Anti-Trust Fails: Public Health, Public Hospitals and Public Values,* 71 Wash. L. Rev. 899-917 (1996).

## CONCLUSION

This case gives this Court the opportunity to fashion a legal standard for state action immunity that is easy to apply, so that results will be predictable and consistent. People need to know whether their intended courses of action are immune from federal anti-trust law, or alternatively, whether they are subjecting themselves to potential civil and criminal liability. Finally, federal courts need a clear legal standard to enable them to reach consistent results in similar situations.

Respectfully submitted,

LEWIS H. MARKOWITZ
*Counsel of Record*
MARKOWITZ & MARKOWITZ, P.C.
Two West Market Street
P.O. Box 152
York, Pennsylvania 17405-0152
(717) 843-5527

O. WAYNE ELLERBEE
THE ELLERBEE LAW FIRM, P.C.
1000 Slater Street
P.O. Box 25
Valdosta, Georgia 31603-0025
(912) 242-2211

JAMES F. PONSOLDT
UNIVERSITY OF GEORGIA
SCHOOL OF LAW
Athens, Georgia 30602
(706) 542-5209

*Attorneys for Petitioner*